INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	30
Conclusion	48

CITATIONS

Cases:

Blodgett v. *United States*, 161 F. 2d 47	32
Gage v. *United States*, 167 F. 2d 122	32
Griffin v. *United States*, 336 U. S. 704	32
Gordon v. *United States*, 164 F. 2d 855, certiorari denied, 333 U. S. 862	3
Larrison v. *United States*, 24 F. 2d 82	33, 36
People v. *Shilitano*, 218 N. Y. 161	33, 34
United States v. *Johnson*, 327 U. S. 106	32

Statute:

National Stolen Property Act:

18 U.S.C. [1940 ed.] 415	4
18 U.S.C. [1940 ed.] 418a	4

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 548

MEYER GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 333-342) is reported at 178 F. 2d 896.

JURISDICTION

The judgment of the Court of Appeals affirming the order of the District Court denying petitioner's motion for a new trial was entered on December 5, 1949 (R. 332). On January 3, 1950, the Court of Appeals denied petitioner's motion (R. 310-312; and see R. 343-344), filed on August 19, 1949, to remand the cause to the District Court for reconsideration of its order denying his motion for

a new trial (R. 345). Petitioner's time for filing a petition for a writ of certiorari was extended, by an order of Mr. Justice Reed entered December 29, 1949, to and including January 20, 1950 (R. 346), and the petition was filed on January 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence, consisting primarily of a recantation by the chief government witness of material portions of his trial testimony, the truth of which recantation was disputed.

2. Whether the trial judge committed reversible error in privately interviewing a prisoner who had made an affidavit filed in support of the motion for a new trial and in privately interrogating F.B.I. agents in an effort to verify the truth of the prisoner's statements.

3. Whether the Court of Appeals erred in denying petitioner's motion to remand the cause to the District Court for reconsideration of its motion for a new trial, the motion to remand being based on newly discovered evidence of the dismissal of a state charge against the principal government witness as an alleged reward for his testimony against petitioner.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Sixth Circuit (R. 332) affirming an order of the District Court for the Eastern District of Michigan (R. 245) denying a motion for a new trial on the ground of newly discovered evidence (R. 1-28, 37-51). The motion was filed a few days short of two years after petitioner's conviction of offenses under the National Stolen Property Act (R. 1). This conviction was affirmed by the court below, *Gordon* v. *United States,* 164 F. 2d 855, and this Court denied a petition for a writ of certiorari, 333 U.S. 862. In view of the fact that the motion for a new trial was predicated on the recantation by the Government's chief witness at petitioner's trial—one Herman Frank Banning, a codefendant who pleaded guilty—of certain material portions of his trial testimony, and since the truthfulness of this recantation was sharply in dispute in the proceedings on the motion, it becomes necessary to review at some length not only the evidence, in the form of affidavits and counter-affidavits, adduced before the District Court on the motion, but also the testimony given by Banning at the original trial and the Government's independent evidence corroborative of that testimony. References below to the original record of petitioner's trial, conviction, and appeal (No. 602, this Court, O.T. 1947) will be indicated by the designation "Orig. R." to

distinguish it from the record of the instant proceedings (designated "R.").

1. On September 11, 1943, petitioner and five codefendants—Banning, Bernard Sidran, Howard Graves, Abe Zussman, and Bernard Gridley—were jointly indicted in two counts (Orig. R. 1-6) for violations of the National Stolen Property Act. Count 1 charged them with having conspired to transport divers articles of stolen jewelry "in interstate commerce, to-wit, from cities and towns and communities and places in different states of the United States, and from the City of Detroit * * * to the City of Chicago" (Orig. R. 2), in violation of 18 U.S.C. [1940 ed.] 418a. Count 2 charged them with having committed the substantive offense of transporting, from Detroit to Chicago, on or about September 13, 1940, specified articles of jewelry stolen from one Walter Ollendorff (Orig. R. 6), in violation of 18 U.S.C. [1940 ed.] 415.

Banning pleaded guilty to these charges (Orig. R. 162), and was the chief prosecution witness at the trial, which resulted in the conviction of petitioner and Zussman on both counts (*id.* 48).[1] Banning's testimony, insofar as it implicated pe-

[1] The indictment was dismissed as to Gridley at the close of the Government's case (Orig. R. 410). Sidran and Graves were not tried, due to the inability of the Government to procure their presence for trial; they were incarcerated at the time in the Ohio State Penitentiary at Columbus, and the warden of that institution refused to honor a writ of habeas corpus *ad prosequendum* issued by the district court for their production (Orig. R. 52; R. 120, 158-159).

titioner in the offenses charged, may be summarized as follows:

On September 7, 1940 (Orig. R. 72), Banning, Sidran, and Graves went from Chicago to Detroit in search of a jewelry salesman to rob (*id.* 75-76). In Detroit, they decided to include a fourth person, Zussman, in their enterprise (*id.* 80). On September 13, 1940, these four, with the cooperation of Gridley, a bellboy at the Book-Cadillac Hotel, stole a quantity of jewelry from a salesman, Ollendorff, who was registered at that hotel (*id.* 79-84). Pursuant to agreement, Graves drove with the jewelry to Chicago, and Banning, Sidran, and Zussman proceeded separately to Chicago (*id.* 86, 89). On the morning of September 14, 1940, Banning registered at the Southmore Hotel under an assumed name (*id.* 90). Banning, Sidran, and Zussman then waited in the hotel lobby "for Graves to arrive with Mr. Gordon [petitioner]" (*id.* 91). Upon Graves' and petitioner's arrival, all but Zussman (who remained in the lobby) proceeded to Banning's hotel room, where petitioner examined the stolen jewelry and purchased it for $1,000 (*id.* 91-92).

The above-described interstate transportation of stolen jewelry was that charged in the substantive count (2) of the indictment. In addition, as further proof of the conspiracy charge (count 1) and as evidence of prior offenses similar in nature to that charged in the substantive count, Banning

testified to many other jewelry thefts perpetrated by himself and various associates, followed by interstate transportation of the loot to Chicago and its sale to petitioner. Banning first met petitioner in 1935, he testified, at which time he was introduced to petitioner as a "new man" (Orig. R. 102). On this occasion petitioner advanced money to Banning and several associates, including Graves, for expenses in connection with trips to be made from state to state for the purpose of stealing jewelry (*id.* 102-103). On other occasions thereafter petitioner advanced funds to Banning and Graves for such expenses (*id.* 116). Between 1935 and 1941, Banning and several associates, usually including Graves, engaged in approximately twenty-five armed jewel thefts and robberies (*id.* 76, 197), and, according to Banning, "we always sold our merchandise in Chicago" to petitioner (*id.* 87). Banning described in detail at the trial, in addition to the Ollendorff theft above related, thefts of jewels from salesmen in Columbus, Ohio, in March 1936 (*id.* 104-107), in Indianapolis, Indiana, in September 1936 (*id.* 111-115), in Nashville, Tennessee, in December 1936 (*id.* 109-111), near Houston, Texas, in April 1937 (*id.* 122-125), in Memphis, Tennessee, in November 1937 (*id.* 115-117), again in Indianapolis, in September 1938 (*id.* 117-118), in Grand Rapids, Michigan, in June 1939 (*id.* 120-121), in Spencer, Iowa, in August 1940 (*id.* 130-134), in Akron,

Ohio, on August 28, 1940 (*id.* 136-141), and in San Antonio, Texas, in February 1941 (*id.* 144-146).

Banning was the only government witness to identify petitioner as the recipient of the jewelry in the various thefts he described. However, Banning's testimony linking petitioner and himself in his criminal enterprises was thoroughly corroborated in at least two important particulars.

As the Court of Appeals pointed out in its opinion affirming petitioner's conviction (164 F. 2d at 859):

> Banning's story is sustained by independent evidence not only as to the robberies committed, but as to the leading part which appellant played in guiding and assisting the operations. * * *
>
> Banning said that he bought a number of cars during these years from an automobile dealer named Irving Braud, to use in the robberies, and that appellant assisted in the purchases. He declared that on one occasion he bought a Ford car for about $400, and only had ten or twenty dollars available for a down payment. He says that he told Braud to get the balance of the money from appellant, and that this was done. Also he said that he loaned Braud $2,000, which he got from appellant.
>
> Braud strongly substantiated this phase of Banning's testimony. He did business with a number of the confederates, including the appellant. * * *
>
> But Braud's testimony was corroborative of more than a mere close relationship between

appellant and the group. He testified that on one occasion he needed some money, and Banning told him to get it from appellant. The money, $2,000, was received by Braud, and no security was required. Braud testified categorically that he "did contact Meyer Gordon at his office," and that he "did get money from" appellant after Banning told him to go there. * * *

The second instance of corroboration was described by the Court of Appeals as follows (164 F. 2d at 857, 860):

> * * * Banning also testified that appellant interceded with a physician in Chicago in May, 1941, in order to arrange so that Banning would not be compelled to appear in Omaha on May 19, 1941, to answer to a jewelry robbery charge.
>
> * * * * *
>
> As to the incident of May, 1941, in which Banning described appellant as having arranged so that he would not have to answer to an indictment in a Nebraska state court, the corroboration is very complete. Appellant called a physician named Joseph Gale, whom he had known for ten or twelve years, and asked him to see Banning. Gale referred the matter to a Dr. Finkel, who sent a telegram, as requested, to Banning's attorney in Omaha. In the course of this incident Banning was entered at the Edgewater Hospital in Chicago, but it was found that he had nothing wrong

with him, and the medical director of the hospital ordered him dismissed after a few hours. Four physicians testified as to this incident completely corroborating Banning.

In addition to the above instances of corroboration of Banning's testimony insofar as it implicated petitioner, Banning's testimony as to his perpetration of numerous robberies was thoroughly corroborated by the victims of his offenses (see 164 F. 2d at 859).

Neither petitioner nor Zussman testified at the trial. The only evidence offered on petitioner's behalf was a letter written by Banning to his wife Julia, on June 27, 1943, from Leavenworth Penitentiary (Orig. R. 242-244). At that time Banning was serving a sentence for a crime (the robbery of a jewelry salesman named Weiss) which he did not commit (see *infra,* pp. 15, 25). In this letter Banning had written (Orig. R. 243):

> * * * Honey * * * the F.B.I. * * * wanted the people that worked with me and the fence * * *. * * * you remember * * * Abie Ginsberg from Minneapolis * * *. Well, *he was my fence* and they tell me he is dead * * * and one of the boys with me is dead, * * * so they are not doing much to help me, but if these people were alive perhaps I could of got a break * * * [italics added].

Banning was extensively cross-examined in regard to the quoted statements in this letter, which the

defense maintained were inconsistent with his trial testimony implicating petitioner as his fence in all his transactions. On redirect examination Banning explained the above statements in his letter by saying that at the time he wrote the letter he was having conversations with F.B.I. officials *truthfully* implicating petitioner as his fence, and that, knowing that his wife "was carrying to Gordon and Gordon's attorneys" "everything I told her," he "wrote this letter to throw them off so they wouldn't know what I was doing" (Orig. R. 259).[2]

In addition to cross-examining Banning concerning the above letter to his wife, petitioner's trial counsel repeatedly asked Banning if he had not tried to persuade his wife to cooperate with him in falsely implicating petitioner as his fence (Orig. R. 232-239, 245-247), and Banning denied ever having done so. He stated that he told his wife that he had decided "to tell the truth about everything," including "who fenced the merchandise" (*id.* 267).

Not only did petitioner refrain from personally testifying in contradiction of Banning's testimony against him, but he failed to call Banning's wife as a witness in contradiction of Banning as to the nature of the conversations had by her with him, and to support the defense contention (as evidenced by the above-related line of cross-examina-

[2] For a more detailed explanation by Banning of his motives in writing this letter *falsely* stating his fence to be a Minneapolis man named Ginsberg, see Orig. R. 255-263.

tion of Banning) that Banning sought to induce his wife to join him in "framing" petitioner. In fact, as we have pointed out, petitioner's sole defense was the introduction of Banning's letter to his wife of June 27, 1943, which she turned over to petitioner and his attorneys for use at the trial (R. 21; and see Orig. R. 260).

Petitioner was convicted and sentenced to ten years' imprisonment and fined $10,000 on each of the two counts of the indictment, the prison sentences to run consecutively (Orig. R. 50-51).

2. The instant proceedings began with the filing, on petitioner's behalf, on May 19, 1948, of a motion for a new trial on the ground of newly discovered evidence (R. 1-10), the new evidence relied on consisting principally of admissions by the Government's witness Banning that he perjured himself at petitioner's trial. Four supporting affidavits were attached to the motion, consisting of two recanting affidavits by Banning (Exhibits A and B, R. 10-13, 14-16), and affidavits by Banning's wife (Exhibit C, R. 16-22) and the convicted codefendant Zussman (Exhibit E, R. 24-25).[3]

In Banning's first affidavit (R. 10-13), dated March 30, 1948, he stated that the testimony he had given at the trial relative to the Ollendorff theft (on which the substantive count of the indictment was predicated) was true up to the time of the

[3] Also attached to the motion were affidavits by the attorneys (Exhibits D, F, and G, R. 22-23, 26-27, 28) who procured the principal affidavits.

"actual theft," but was false insofar as it implicated petitioner as the recipient of the stolen jewelry involved in that case (R. 11-12). He said that when Sidran, Zussman, and he arrived in Chicago from Detroit on the morning of September 14, 1940, following this theft, he checked in at the Southmore Hotel, while Sidran and Zussman "went on presumably to meet Graves"; that later that day he left the hotel and flew to Louisville, Kentucky; that five or six days later Graves told him in Chicago "how much he received for the jewelry and paid me my share"; but that he "did not see Meyer Gordon that day in the Southmore Hotel, as I testified, nor did I have any conversation with him relative to the jewelry stolen from Ollendorff on that day, or any other day" (R. 12). He said the reason why he testified falsely to having met petitioner and shown the Ollendorff jewelry to him in the Southmore Hotel was a "personal grudge" he had against petitioner "arising out of his association with my wife" (*ibid.*). He also said that he testified against petitioner because he "was well aware of the fact that unless a conviction was had against Gordon, I would not receive any consideration from the Governmental authorities" (R. 11). His affidavit also contained the following statement (R. 10):

> * * * As to why Sidran and Graves were not tried at the same time [as petitioner, Zussman, and Gridley (see footnote 1, *supra*, p. 4)] I have not been advised, however, I ad-

> vised agents of the Federal Bureau of Investigation and Thomas P. Thornton, then Assistant United States' Attorney for the Eastern District of Michigan, that I would absolutely refuse to testify in the trial if Sidran and Graves were brought back from Columbus, Ohio and placed on trial. * * *

In his second affidavit (R. 14-16), dated a week later, April 6, 1948, after stating that he did nothing at the Southmore Hotel on September 14, 1940, other than change his clothes, rest, and make a plane reservation for Louisville, Banning added that, though he had received "no definite promises" from the Government in exchange for his testimony against petitioner, he "was satisfied in my own mind", from his treatment by and conversations with government officials, that he "would be discharged from the sentence I was then serving [for a crime he did not commit; see pp. 15, 25, *infra*]" and "would not be sentenced on the Ollendorff transaction" if he testified against petitioner (R. 14). He felt confident of this, he added, because "[t]he Government agents were so determined to get Meyer Gordon" (R. 15).

In Banning's wife's affidavit (R. 16-22), dated April 1, 1948, she told about receiving the letter of June 27, 1943, from her husband, written from Leavenworth Penitentiary (this being the letter in regard to which Banning was so extensively cross-examined at petitioner's trial; see pp. 9-10, *supra*), in which he told her that "Abie Ginsburg from

Minneapolis * * * was my fence" (R. 17). She turned this letter over to petitioner's attorney, she stated, upon later learning that her husband was planning to testify falsely against petitioner (R. 21). She further stated that on August 6, 1943, when she visited her husband in the county jail at Detroit, he told her that "he was going to get out, but that he had to talk on a man in Chicago named Meyer Gordon", and asked her "if she would 'cooperate' and say whatever he told her to say about Meyer Gordon" (R. 17-18); that on several subsequent occasions during the next three years her husband renewed his request that she "cooperate" with him in "framing" petitioner (R. 19); but that she refused to do so (R. 18, 19). She further stated that an F.B.I. agent named Victor Johnson similarly importuned her to " 'cooperate' with her husband" and threatened to prosecute her for perjury "in the event that she testified in behalf of Mr. Gordon and contradicted her husband" (R. 18, 19, 20).

In Zussman's affidavit (R. 24-25), dated April 28, 1948,[4] he admitted his own participation in the Ollendorff theft, but stated that he had never heard of petitioner until the return of the indictment in the instant case; that he then knew that petitioner was innocent of any complicity in the

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[4] Zussman, a narcotic addict, was at that time a prisoner-patient in the United States Public Health Service Hospital, Lexington, Kentucky, where he was confined following his conviction in the instant case (R. 24, 26, 198-199).

Ollendorff theft; but that he could not take the stand to so testify because, to do so, he would have had to confess his own participation in that theft (R. 24). He explained how he knew of petitioner's innocence in the Ollendorff matter by saying that it was his "understanding from the conversation between the other men [following the theft], that they expected to dispose of the merchandise to a person named Abe Ginsberg" (R. 25). He added that he himself had "had nothing to do with the disposal of the merchandise" in that case (*ibid.*).

The motion for a new trial, in addition to calling attention to Banning's recanting affidavits and the other affidavits above described, alleged that, following petitioner's conviction and "for the purpose of rewarding" Banning for his part in convicting petitioner, the following things were done for Banning by the Government: (1) Banning received a Presidential pardon, pursuant to a petition prepared by the Assistant United States Attorney (Mr. Thornton) who successfully prosecuted petitioner, for the crime for which he, Banning, was serving a 20-year sentence in Leavenworth Penitentiary when he testified against petitioner; (2) Banning, notwithstanding his plea of guilty to the instant indictment and notwithstanding his admission of many armed robberies in his testimony in the instant case, was freed on bond following his receipt of the above Presidential pardon on June 7, 1947, and remained at liberty until February 21, 1948, when he was captured by Detroit

police in connection with the holdup of some gasoline filling stations, in the course of which he was shot and wounded in a running battle with the police; and (3) a federal indictment pending against Banning in Cleveland, Ohio, was dismissed, notwithstanding that he had confessed to the charges thereof in his testimony in the instant case (R. 5-6). All these "rewards", it was contended, tended to substantiate the truth of Banning's recent admission (in his recanting affidavits) that he perjured himself in testifying against petitioner in the hope of receiving consideration from the Government for his assistance in convicting petitioner.

In an amendment of his motion for a new trial (R. 37-40), filed July 2, 1948, petitioner directed the court's attention to the existence of two affidavits executed in Ohio State Penitentiary, Columbus, Ohio, by the codefendants Sidran and Graves in March 1947, at which time petitioner's appeal from his original conviction was pending in the Court of Appeals (R. 40). These affidavits had originally been filed in support of a motion, filed in (and denied by) the Court of Appeals, to remand the cause to the District Court for the purpose of entertaining a proposed earlier motion for a new trial (*ibid.*). In the amendment of the instant motion for a new trial, it was averred that these affidavits corroborated Banning's recanting affidavits "in that they assert this defendant's innocence of any participation in the offense for

which he stands convicted" (*ibid.*). Copies of Sidran's and Graves' affidavits were attached to the amended motion as Exhibits X (R. 41-47) and Y (R. 47-51), respectively.

Sidran, in his affidavit (R. 41-47), dated March 11, 1947, stated that "had he been present at this trial [see footnote 1, *supra,* p. 4, as to why Sidran, though a codefendant, was not present], he would have testified in his own behalf in refutation of the testimony of * * * Banning" (R. 45). He had met Banning only once, Sidran stated, either in the latter part of 1939 or early in 1940 (*ibid.*). Contrary to Banning's trial testimony, Sidran further stated, he did not see petitioner in any Chicago hotel in September 1940; did not participate in the Ollendorff theft; did not participate with Banning in various other jewel thefts in which Banning had implicated him; and had never had any dealings with petitioner (R. 45-47, 43). Sidran further stated that he and his wife were "on a Great Lakes Cruise through the Thousand Islands" during the latter part of August and the early part of September 1940; that they did not return from this cruise until September 10, 1940; and that on September 13, 1940 (the date of the Ollendorff theft), he took his pregnant wife to a Dr. Hyman Mellon (R. 46). This proved, he stated, that he could not have participated either in the Akron holdup of August 28, 1940, or the Ollendorff theft, in both of

which Banning's trial testimony had implicated him (R. 46-47).[5]

Graves, in his affidavit (R. 47-51), also dated March 11, 1947, contradicted Banning's trial testimony implicating him in the Ollendorff theft and various other thefts occurring in 1940, and claimed that he had not even seen Banning during that year (R. 50-51).[6]

3. On July 16, 1948, the Government filed an exhaustive motion (R. 52-79), supported by numerous affidavits and other materials (R. 80-169), for an order denying petitioner's motion for a new trial. The Government's motion sought to show that Banning's recanting affidavits were false and given under most suspicious circumstances; that the other affidavits in support of the motion for a new trial were also false; that Banning's trial testimony, which the jury believed after being carefully cautioned to scrutinize it with care, was credible, true, and corroborated in vital respects; and that petitioner had had it in his power, at the time of his

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[5] It should be noted that insofar as Sidran, in this affidavit, denied complicity in the Ollendorff theft, he is contradicted not only by Banning's trial testimony, but also by the latter's recanting affidavits (see pp. 11-13, *supra*).

[6] As in the case of Sidran (see footnote 5, *supra*), Graves was contradicted not only by Banning's trial testimony, but also by the latter's recanting affidavits, insofar as he denied complicity in the Ollendorff theft (see pp. 11-13, *supra*).

Mr. Thornton, the Assistant United States Attorney who prosecuted petitioner, stated in an affidavit that when Banning read Sidran's and Graves' affidavits, he called them "liars" (R. 122). See also pp. 27-28, *infra*.

trial, to demonstrate the falsity of Banning's testimony implicating him (if it was false) by numerous witnesses, including petitioner himself.

Victor Johnson, an F.B.I. agent who participated extensively in the investigations leading up to the indictment and conviction of petitioner, stated in his affidavit (R. 83-88) that Banning never stated to him that he would refuse to testify against Sidran and Graves, though he expressed a "desire" not to testify against his friend Graves (R. 84); that in all his conversations with Banning, the latter told him he was willing to "tell the truth" against petitioner because the latter had "failed to take care of him" following his, Banning's, arrest in 1941, and had failed to keep his promise of financial assistance to his, Banning's, wife and mother (R. 84-85); that he "never made any promises to Banning that he would receive any consideration from the Government in exchange for his testimony" (R. 85); that he was interested solely in obtaining "the true facts in relation to the activities of Meyer Gordon and the other persons involved" (*ibid.*); that he never sought to induce Banning's wife to "cooperate" by giving false testimony against petitioner (R. 85-88); that he asked Mrs. Banning to testify for the Government, but that she declined because, she said, she did not wish to be a "stool pigeon" and because she feared for her personal safety if she testified (R. 86-87); and that he never told Mrs. Banning that if she contradicted her

husband and testified on behalf of petitioner, the Government would prosecute her (R. 88), though he did tell her that "it would not be advisable for her to take the stand and give false testimony to aid the defendant Gordon, because if she did, consideration might be given by Federal authorities to prosecution of her for perjury" (R. 87).

Joseph Iseman, another F.B.I. agent, stated in his affidavit (R. 93-104) that on February 21, 1948, he and a fellow agent, Karl Zeimes, were told by Senior Inspector Marvin Lane of the Detroit Police Department that William Comb,[7] an attorney, had asked Lane for, and been granted, permission to visit Banning in the Detroit Receiving Hospital (R. 94). Banning had been admitted to this hospital on the preceding day, suffering from wounds received in a gun battle with Detroit police arising out of the armed robbery of some gasoline stations (R. 93-94; see pp. 15-16, *supra*). On February 24, 1948, Iseman and Zeimes visited Banning in the hospital, and asked him, among other things, who had been in to see him; Banning replied that Comb had visited him, but only "as a friend," explaining that Comb had once represented him as an attorney (seven years previously), but was not acting in that capacity at that time (R. 94). Banning added that Comb was going to do some favors for him—

[7] Comb was the attorney who prepared for Banning's signature the latter's two recanting affidavits of March 30 and April 6, 1948 (R. 28); in his interviews with Banning incident to the latter's execution of these affidavits, Comb was acting on behalf of petitioner's wife, Mrs. Rose Gordon (*ibid.*).

collect some wages due him, and do what he could for Banning's "girl friend," who had been arrested for parole-violation shortly after Banning's latest apprehension (R. 94-95).

Iseman further stated in his affidavit that, during this February 24 conversation with Banning, Banning told him that on the preceding Tuesday (February 17) someone called Banning on the telephone and offered him $5,000 if he would "help Gordon," but that Banning refused to discuss the matter (R. 96). Iseman and Zeimes then asked Banning "whether anyone else ever made any recent offers to him in an attempt to get him to alter the testimony given at the trial" (R. 97). Banning replied in the negative, and added that "it would not do any good if they did" because all of his trial testimony was true (*ibid.*). Iseman further stated that Banning asked him and Zeimes on this occasion to "help him get out of the custody of the State authorities and into the custody of Federal authorities" (R. 103).

Iseman further stated in his affidavit that Banning, after remaining approximately one month (February 20 to March 19, 1948) in the Detroit Receiving Hospital, was transferred to the Detroit City Jail, where he remained four days, until March 23, 1948, on which date he was removed to the Wayne County Jail, where he remained until June 23, 1948, when he was transferred to the State Prison at Jackson, Michigan, to start serving a

50- to 60-year prison sentence for assault with intent to commit murder, imposed June 22 (R. 94, 104). On May 24, 1948, Iseman stated, he checked the records of the Detroit Receiving Hospital and the Wayne County Jail to determine the frequency of Comb's visits to Banning (R. 95). He found that the Receiving Hospital kept no record of visitors, but ascertained that in the two-month interval between March 23, 1948, when Banning entered the Wayne County Jail, and the date of Iseman's check of the records, Comb had visited Banning on 27 different occasions (R. 95-96). The records further showed that Comb's visits with Banning, commencing on the very day of Banning's admission to the jail (March 23), continued almost daily to March 30 (the date of Banning's first recanting affidavit), and again almost daily to April 6 (the date of his second recanting affidavit) (R. 95).

During the month of May 1948, Iseman further stated, Banning told him that, on the occasion of Comb's first visit with him in the Wayne County Jail, he "told Comb that he did not observe Gordon get the jewelry which had been stolen in the Ollendorf robbery" (R. 97). Comb replied that "this information was no good and wouldn't help anyone" (*ibid.*). A day or so later, Banning further told Iseman, Comb "brought a sheet of paper with some questions written on it in regard to the 'Ginsberg letter' Banning had written to his wife" (see

pp. 9, 13-14, *supra*); Comb read the questions to Banning, who answered "No" to each; at the end of the questioning, Banning told Comb that "Anyone who sat through the trial of this thing would know there is nothing to that Ginsberg deal" (see pp. 9-10, *supra*) (R. 97). After extended questioning by and conversations with Comb, who took extensive notes, Banning further told Iseman, "Comb returned with an affidavit. * * * [Banning] did not read the first draft of the affidavit very carefully, and signed the first draft brought to him. Thereafter Mr. Comb returned with a supplemental affidavit which Banning signed" (*ibid.*). "When questioned generally about why he had signed the affidavits," Iseman further stated, Banning "stated that he signed the affidavits to rid himself of the name of 'stool pigeon' and 'to take the heat off' with his fellow prisoners at Wayne County Jail" (R. 98). Banning added that, on an earlier occasion when he was confined in that jail, he had "tipped off the jail authorities" about a proposed prison break; that other prisoners then in Wayne County Jail, but subsequently transferred to "Michigan State prisons," had since learned of this action of Banning; and that he believed that "if he is placed in any 'Michigan Pens' he will get 'a shiv in his back'" (*ibid.*). Banning further told Iseman that the statement in his March 30 affidavit that he had "absolutely refused to testify in the trial of Meyer Gordon

* * * if Sidran and Graves were brought ba
from Cleveland, Ohio, and placed on trial" "shou
not have been in the affidavit and would not ha
been in there if he had read it carefully" (*ibid*
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not personally see Gordon receive the jewelry fr
the Ollendorff robbery, he felt sure that he h
received it because he, Banning, Graves, and Sidr
had always disposed of all jewelry they had stol
to Gordon" (R. 99). Banning further told I
man that the statements in his April 6 affida
that "the Government Agents were determined
get Meyer Gordon" and that he was convinc
that in return for his testimony he would be "
the street", were untrue (*ibid.*). Banning also to
Iseman that he had never been promised lenien
by the Government in return for his testimony (
101-102). Banning also contradicted, according
Iseman, various statements in his wife's affida
(see pp. 13-14, *supra*) to the effect that he a
agent Johnson ever attempted to persuade her
"cooperate" by giving false testimony against pe
tioner (R. 102). Nevertheless, despite these vario
statements of Banning to Iseman, contradicti
some of the statements appearing in his own r
canting affidavits and in his wife's affidavit, Ba
ning admitted to Iseman and other agents that h
was recanting, at least to some extent, his tri
testimony (see R. 203, 295).

On June 10, 1948, Iseman's affidavit furth

stated, Banning threatened to "make some more affidavits" if he, Iseman, would not do what he could to "get [Banning] into a Federal Pen" (R. 103). "If you get me into a Federal Pen," Banning stated, "we can keep Gordon in" (R. 104).

Iseman's affidavit was corroborated by affidavits of F.B.I. agents Willoughby (R. 105-113) and Zeimes (R. 113-115).

With reference to petitioner's claim that Banning was "rewarded" for his trial testimony by receiving certain favorable consideration from the Government (see pp. 15-16, *supra*), affidavits were filed by Harold D. Beaton (R. 116-119), a Special Attorney in the Department of Justice, and Thomas P. Thornton (R. 120-126), the Assistant United States Attorney who successfully prosecuted petitioner. Both Beaton and Thornton stated that the Presidential pardon granted Banning in connection with his 1941 conviction under the National Stolen Property Act was procured because subsequent events demonstrated that he was not and could not have been guilty of the particular offense of which he was convicted (R. 117-119, 123). Beaton also explained that the United States Attorney at Cleveland was authorized to dismiss the indictment there pending against Banning, Sidran, Graves, and one Petrelli because Banning, without whose testimony the possibility of a successful prosecution was remote, refused to testify against his co-defendants, and because, in addition, all the de-

fendants were either already under heavy sentences in penitentiaries or were awaiting sentence (R. 116-117). Thornton further explained that, following Banning's receipt of the above-mentioned Presidential pardon, and while he was awaiting sentence on his plea of guilty in the instant case, the Pinkerton Detective Agency indicated interest in employing Banning in an undercover capacity to assist it in investigating certain recent jewel thefts; that Banning expressed willingness to accept such employment; that, with the approval of the court, Banning was released on his personal bond for the purpose of accepting such employment; but that "[a]fter Banning's release as aforesaid, the Pinkerton Agency did not so employ him, with the result that Banning gained employment in private industry in Detroit" (R. 124). Thornton further stated that he never offered Banning, and that Banning never requested, any consideration for his testimony at petitioner's trial (R. 122).

In addition to the above-described affidavits offered in support of its motion in opposition to the motion for a new trial, the Government filed, in further support of its motion, and as "Exhibit 'M' " thereto, a document entitled "Appellee's Memorandum in Opposition to Motion to Suspend Appellate Proceedings and Remand Cause to the District Court, &c." (R. 127-169). This memorandum had previously been filed in the Court of Appeals while petitioner's appeal from his original

conviction was pending; it was submitted in opposition to a motion by petitioner to remand the cause to the District Court for the purpose of having that court entertain a proposed motion for a new trial, based upon the affidavits of Sidran and Graves, to which we have already referred (see pp. 16-18, *supra*). In this memorandum, *inter alia,* the Government pointed out that not only had petitioner himself not taken the stand to contradict Banning at the trial (R. 138-139), but that there were numerous persons referred to by Banning in his trial testimony whom petitioner could have called as witnesses, but did not, to contradict Banning's allegedly perjurious testimony (R. 139-144). Attached to this memorandum as exhibits were several affidavits which showed the falsity of Sidran's alleged alibi (see pp. 17-18, *supra*) offered by him to prove, in contradiction of Banning's trial testimony, that he could not have participated with Banning in either the Akron robbery of August 28, 1940, or the Ollendorff theft of September 13, 1940.[8] The Government's memorandum also showed the falsity of Graves' affidavit, in which he denied all association with Banning during the year 1940 (*supra,* p. 18), by pointing out that

[8] The affidavit of Maurice La Belle (R. 153-155) showed that the Great Lakes Cruise taken by Sidran and his wife took place between August 20 and August 27, 1940. Furthermore, Dr. Mellen, the physician to whom Sidran claimed to have taken his pregnant wife on September 13, 1940, stated in an affidavit (R. 155-156) that he last treated Mrs. Sidran in April 1940.

Graves had been positively identified at petitioner's trial as one of the participants with Banning in the Akron holdup of August 28, 1940 (R. 137-138).

4. After a motion to strike the Government's answer (R. 170-173) was overruled (R. 174), petitioner filed a reply (R. 174-180) which was supported by a further affidavit by Banning, his third (R. 181-190), and by an affidavit by the attorney Comb (R. 191-194), describing the circumstances under which he procured Banning's earlier affidavits, and denying the use of undue influence in their procurement.

In his third affidavit, dated August 23, 1948, after he had been committed on the Michigan sentence (see pp. 21-22, *supra*), Banning stated that he told the F.B.I. agents time and again, after making his original affidavits, that he had "lied at the Gordon trial" in implicating Gordon in any way in the Ollendorff theft, and accused the agents of omitting from their affidavits this admission on his part (R. 181-182). He further stated that many of Mr. Comb's visits to him in jail around the time of his making the original affidavits had nothing to do with the execution of these affidavits, but were devoted to the doing of sundry personal favors for him (R. 183-184). He also contradicted some of the statements made in the affidavits filed by agent Iseman and other agents (see pp. 22-25, *supra*), notably the state-

ments, attributed to him by the agents, that he feared mistreatment by fellow prisoners (R. 188-189), that he desired to get into a federal penitentiary (R. 189), and that he "felt sure" that petitioner "had fenced the [Ollendorff] merchandise" (R. 189-190). He further stated that, during the two-year period in which he was confined in Wayne County Jail in Detroit prior to petitioner's trial, "there were many things done for me which made me feel sure that if Meyer Gordon were convicted I would be set free" (R. 186). He was given certain privileged positions at the jail, such as elevator operator, storekeeper, and turnkey, he said, and on one occasion agent Johnson "bet me a $10.00 hat that if Gordon were convicted I would be freed" (R. 186-187). His trial testimony that he "hadn't even been thinking about getting out of jail" was therefore untrue, he added (R. 187).

5. On December 7, 1948, a hearing on the motion for a new trial, consisting of argument by counsel, was held (R. 197-244). At this hearing, there was filed, for the first time, an affidavit by petitioner (R. 195-196), dated October 21, 1948, denying that he had ever received the proceeds of the Ollendorff theft, and stating that he had never met Banning, Graves, or Sidran "at the Southmoor Hotel in Chicago." On December 23, 1948, District Judge Picard—the same judge who presided at petitioner's trial—denied the motion (R. 245).

On December 28, 1948, petitioner moved for an order vacating the order denying the motion for a new trial (R. 246-252), which was answered (R. 253-269) and, following a hearing (R. 270-304), was denied on January 4, 1949 (R. 304). While the cause was pending in the Court of Appeals, petitioner filed a motion to remand the cause to the District Court for reconsideration of the motion for a new trial, on the basis of newly discovered evidence (R. 310-320). The motion to remand was denied by the Court of Appeals (R. 345), which also affirmed the orders of the District Court (R. 332). The matters referred to in this paragraph will be discussed in the Argument, *infra,* pp. 43-48.

ARGUMENT

1. Petitioner contends (Pet. 3, 10-11, 29-33) that because Judge Picard, who sat both at petitioner's trial and in the proceedings on the motion for a new trial, remarked, in the course of the hearing on the motion for a new trial, that he "didn't necessarily believe Banning" at the trial (R. 226), the judge was under a duty to grant him a new trial. We think this contention is unsound.

It is evident that petitioner seeks to equate Judge Picard's remark that he "didn't necessarily believe Banning" at the trial to a statement that he *did not* believe Banning's trial testimony. Even on their face, however, the two statements are manifestly not equivalent. And examination of the context in which Judge Picard's remark was made dis-

closes that he had no intention of declaring his disbelief in Banning's trial testimony. The remark was made in the course of a colloquy with one of petitioner's attorneys at the hearing, who had argumentatively asked the judge, "* * * why should you believe Banning's testimony when given on the witness stand * * *, and disbelieve the recantation which has now been made?" Judge Picard's reply, now so strongly relied upon by petitioner, was obviously made for the purpose of informing counsel that he was assuming too much by his question, since he, the judge, had never *said* he believed Banning at the trial (see R. 226).

It is clear to us, as it was to the Court of Appeals (see R. 338-339), that Judge Picard eventually decided (not necessarily during the hearing, but at least some time prior to his decision denying the motion for a new trial) that Banning told the truth at the trial, and was lying in his recanting affidavits. If there could be any doubt as to the correctness of the Court of Appeals', and our, understanding that Judge Picard, in denying the motion for a new trial, disbelieved Banning's recantation of his trial testimony, that doubt is removed by the judge's explicit statement,—"* * * I don't believe Banning today,"—made during the hearing on the motion to vacate the order denying the motion for a new trial (R. 277). For the reasons presently to be stated, there was ample basis for Judge Picard's disbelief of Banning's recanting affidavits and for

crediting his testimony at the trial, and, hence, for his denial of the motion for a new trial.

A motion for a new trial on the ground of newly discovered evidence is addressed to the informed discretion of the trial judge; absent a showing of abuse of that discretion, there is no occasion for appellate interference with his decision. *United States* v. *Johnson,* 327 U.S. 106; *Gage* v. *United States,* 167 F. 2d 122, 125 (C.A. 9); *Blodgett* v. *United States,* 161 F. 2d 47, 54-56 (C.A. 8). This is so because it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances." *United States* v. *Johnson, supra,* 327 U.S. at 111.[9]

The fact that a prosecution witness recants his trial testimony following the conviction of a defendant against whom he testified does not, *ipso facto,* necessitate the granting of a new trial, and this is so, even though the recanting witness'

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[9] Petitioner strongly relies upon *Griffin* v. *United States,* 336 U. S. 704 (Pet. 29-31), but that case, we think, is inapposite. The *Griffin* case did not involve a recantation by a government witness. There was no conflict about the truth of the new evidence there relied on for a new trial, *viz.,* the presence of the open knife in the deceased's pocket, because "the Government conceded that it knew of this circumstance at the time of the trial" (336 U. S. at 707). Here, on the other hand, the truthfulness of Banning's recantation was sharply controverted.

testimony was highly material. *Larrison* v. *United States,* 24 F. 2d 82 (C.A. 7); *People* v. *Shilitano,* 218 N.Y. 161. The *Larrison* case, *supra,* which is cited by the court below (R. 338), is strikingly similar on its facts to the case at bar. There the Seventh Circuit held that when a trial judge is confronted with a recantation by an important Government witness, he should, before granting a motion for a new trial on the basis of the recantation, be "reasonably well satisfied," first, that the recanting witness' trial testimony was in fact false; second, that "without it the jury *might* have reached a different conclusion"; and, third, that "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial" (24 F. 2d at 87-88). Under this rule, the fact that the trial judge may doubt, in consequence of the recantation, that a new jury would give credence to the witness' original testimony, does not in itself require him to grant a new trial.[10] He must himself inquire into the question of whether it was at the trial or in the recantation that the witness spoke the truth. He is not "at liberty to shift upon the shoulders of another jury his own responsibility" in this re-

[10] Hence, we think, petitioner mistakenly relies (Pet. 3, 10, 31) on Judge Picard's statement during the hearing on the motion for a new trial that "[t]here couldn't be a jury in the world found now to believe Banning" (R. 231).

gard (Cardozo, J., concurring in *People* v. *Shilitano, supra,* 218 N.Y. at 180).[11]

Judge Picard, we submit, was justified in refusing credence to Banning's recanting affidavits, and, accordingly, in denying the motion for a new trial, in the light of the following facts:[12]

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[11] In the *Shilitano* case, involving a motion for a new trial following a conviction of *first-degree murder,* Judge Cardozo said (218 N.Y. at 180-181):

"Three witnesses for the prosecution have stated under oath to the trial judge that their testimony upon the trial was false. It became his duty to say whether they were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice. He has held them to be conspirators. Unless we can say that he was wrong, * * * we have no right to reverse his order. But I do not see how we can say that he was wrong. I do not understand that even the judges who think this judgment should be reversed, assert that he was wrong. Their view is that with such a conflict of oaths, he should have abandoned the search for truth, and turned it over to a jury. That would have been an easy avenue of escape from a solemn responsibility, but I cannot satisfy myself that along that avenue lay the path of duty. I think it was the duty of the trial judge to try the facts, and determine as best he could where the likelihood of truth lay. * * * I do not mean that to justify a new trial, he must have been convinced—firmly or with a sense of certainty convinced—that the first story of the witnesses was false and that their new story was true. He might act upon a reasonable probability. But if, on the contrary, he was *convinced* that the second tale was false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked [citing cases]. He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself."

[12] In the list of considerations which follow we do not purport to exhaust the factors which may have weighed in Judge Picard's decision to deny a new trial. Judge Picard wrote no opinion from which might be ascertained the relative weight given by him to the various considerations to which we advert. But he "read every word of every affidavit, and all the answers, and everything that has been submitted in this case" (R. 199),

(1) Banning's testimony at the trial was corroborated in several vital respects. Though no witness other than Banning specifically identified petitioner as the receiver of the stolen jewels in the Ollendorff and the many other thefts recounted by Banning, the latter's testimony linking petitioner to his criminal enterprises *generally* was corroborated by at least five witnesses (four physicians and an automobile salesman). See pp. 7-9, *supra*.

(2) If Banning was lying at the trial in naming petitioner as his fence in his thefts generally and the Ollendorff theft in particular, no one knew that fact better than petitioner. Yet, (a) he did not take the witness stand to contradict Banning; (b) he did not call Banning's wife as a witness on his behalf, though she, according to the allegations of her affidavit filed in support of the motion for a new trial, would have been a vital witness, whose testimony, if believed, would have shown Banning to be a perjurer, and F.B.I. agent Johnson, a suborner of his perjury (see pp. 10-11, 13-14, *supra*); and (c) there were numerous other persons referred to by Banning in his trial testimony, not shown by petitioner to have been unavailable to him as witnesses at the trial, who could have contradicted pertinent portions of Banning's testimony

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and gave the case his most conscientious consideration (see, especially, R. 215). So intense, indeed, was his desire to learn whether there had "been a mistake made" in petitioner's conviction (R. 215), that it is now claimed by petitioner that he erred in going too far in his search for the truth (see pp. 43-45, *infra*).

if he was not telling the truth (*supra,* p. 27). As we have indicated, petitioner's only defense at the trial consisted of Banning's alleged prior inconsistent statements (in the letter to his wife, written June 27, 1943), in respect of which he was thoroughly cross-examined, and which he evidently explained to the jury's satisfaction (*supra,* pp. 9-10).

(3) The circumstances under which Banning executed his recanting affidavits rendered them suspect. They were executed at the instance of an attorney whom petitioner's wife had employed to visit him (Banning) in jail,[13] and who admittedly (see R. 183-184, 192) performed numerous favors of a personal nature for Banning at about the time he was procuring the latter's recanting affidavits (*supra,* pp. 20-21, 28). The first recanting affidavit, moreover (March 30, 1948), was made but a little over a month after Banning had assured the F.B.I. agents, on February 24, 1948, that it would be useless for any one to try to induce him to alter his trial testimony, because it was the truth (*supra,* p. 21).

(4) The credibility of Banning's recanting affidavits is further impeached by his admissions to the F.B.I. agents, who questioned him about various of the statements made in them, that some of the statements were either false or misleading (*supra,* pp. 23-24); by his admissions to the agents that he was motivated in making the recantations

[13] Cf. *Larrison* v. *United States, supra,* 24 F. 2d at 89.

by considerations other than vindication of the truth (*supra,* p. 23);[14] and by his threat of June 10, 1948, to "make some more affidavits" if the agents did not do what they could to get him out of Michigan custody and into federal custody (*supra,* p. 25).

(5) In none of Banning's affidavits did he repudiate his trial testimony identifying petitioner as his fence in connection with his numerous thefts other than the Ollendorff theft (*supra,* pp. 5-7, 11-13, 28-29). In fact, petitioner himself, in his eleventh-hour affidavit (R. 195-196; and see p. 29, *supra*) contradicting Banning's trial testimony naming him as the fence in the Ollendorff theft, refrained from contradicting Banning's testimony identifying him as the fence in the long list of other thefts recounted by Banning. And it was not until the prosecuting attorney and the court had "raised a question concerning the absence of any affidavit" by petitioner himself in support of his motion for a new trial that petitioner made even this limited denial of Banning's trial testimony (R. 196; see R. 229-230).

(6) The insinuation in Banning's first affidavit that the Government purposely refrained from trying Sidran and Graves with petitioner because of his, Banning's, alleged refusal to testify against

[14] Banning denied, however, in his third affidavit, that he had made such admissions to the agents (see pp. 28-29, *supra*).

petitioner if he had to testify against Sidran and Graves at the same time (*supra,* pp. 12-13) was squarely refuted by the fact that the Government did all in its power to procure those defendants' presence at the trial under a writ of habeas corpus *ad prosequendum,* which the Ohio state authorities refused to honor (see R. 158-159; Orig. R. 478). Furthermore, agent Johnson denied that Banning ever told him he would not testify at the trial if Sidran and Graves were present (*supra,* p. 19).

(7) The affidavits of Sidran and Graves, in which they denied complicity in the Ollendorff and certain other thefts in which Banning had implicated them at the trial (*supra,* pp. 17-18), and which, if true, were further evidence of Banning's trial perjury, were shown to be false (*supra,* pp. 27-28). Indeed, even the *recanting affidavits* of Banning contradicted them (notes 5 and 6, *supra,* p. 18). Obviously, a demonstrably false affidavit designed to establish the truth of a claim is worse than worthless for this purpose; it tends positively to cast doubt on the proposition in support of which it is offered.

(8) In discounting the affidavit of Zussman (*supra,* pp. 14-15), an admitted accomplice of Banning in the Ollendorff theft, Judge Picard may have been influenced by the following considerations: Zussman admitted in his affidavit having "had nothing to do with the disposal of the merchandise," and, according to Banning's trial testimony, Zuss-

man remained in the hotel lobby while the other thieves went to Banning's room to display the stolen jewels to petitioner (*supra,* p. 5), so that he, Zussman, could have had no personal knowledge of the identity of the fence in that case. Consequently, the only relevant statement in his affidavit was his "understanding from the conversation" of the other thieves that "they expected to dispose of the merchandise to a person named Abe Ginsberg," not petitioner, of whom Zussman had allegedly never heard until the return of the indictment. But, assuming that Zussman was telling the truth in this respect, Judge Picard may well have concluded that the other thieves had deliberately concealed from Zussman the identity of the true fence. This theory finds full support in Banning's trial testimony, which Judge Picard determined to be truthful. For Banning testified that he, Sidran, and Graves, following a discussion among themselves, decided that they "did not want [Zussman] to go up to the room because he did not know Mr. Gordon" (Orig. R. 91). On the other hand, Judge Picard may simply have disbelieved Zussman's affidavit, in view of the fact that it was made by a convicted felon and narcotic addict (fn. 4, *supra,* p. 14), at the instance of an attorney in petitioner's employ (see R. 26), a full two years after the allegedly wrongful conviction of petitioner, which Zussman claimed made him "very unhappy" at the time (R. 25).

2. At one point during his testimony on the original trial, Banning testified that he had not "been promised anything" and that he had not "even been thinking about it [*i.e.*, about the possibility of receiving lenient treatment because of his testifying for the Government]" (Orig. R. 181). Petitioner states that this testimony of Banning's was false (Pet. 16), that the Government was guilty of misconduct in permitting him so to testify and supporting his testimony in summation to the jury while knowing that the testimony was false (Pet. 13), and that, for these reasons, a new trial is required (Pet. 10). But while, in his third recanting affidavit (*supra,* p. 29), Banning did state that he swore falsely in testifying that he "hadn't even been thinking about getting out of jail", he has never retracted his trial testimony that he had been promised nothing in return for testifying. On the contrary, he admits even now that the Government never promised him anything for testifying (*supra,* p. 13). Consequently, there clearly was nothing improper in the prosecuting attorney stating to the jury, in his summation, that Banning had "been promised nothing" (see R. 38-39).

There remains, of course, the falsity of Banning's statement that he had not "even been thinking about" the possibility of leniency. See *supra.* But the truth or falsity of that testimony was plainly placed in issue and submitted to the jury

at the original trial,[15] and it is highly unrealistic to suppose that the jury's verdict was premised on its belief of this testimony. The trial judge, during the hearing on the motion for new trial, pointed out that he was "not naive enough to believe that they [the Government] were going to throw this fellow into a dungeon" (R. 236). And it is not too much to say that it is common knowledge that all defendants who plead guilty and "cooperate" with the Government by testifying against their accomplices hope for more lenient treatment than they could otherwise expect.

The assumption that the jury did not have this knowledge is a slim reed upon which to rest a motion for a new trial. The trial judge specifically cautioned the jury, in his charge, that Banning "is admittedly a rather bad character", that his testimony should be "received by you with caution, that you should scrutinize his testimony very carefully." (Orig. R. 436). In that connection he informed the jury that "the Court expects you to use the experience of years and common sense in this case", and to inquire into the motives behind Banning's testimony (*ibid*). "You know", he said (Orig. R. 437) "whether they have any axe to grind."

Apart from truthfully affirming Banning's statement that he had been made no promises, the

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[15] See the examination of Banning quoted at Pet. 18; Gordon's counsel's summation quoted at R. 38, footnote; and the prosecutor's remarks, in summation, quoted at R. 38-39, footnote.

Government at no point supported his testimony as to his expectations. In his summation, the assistant United States Attorney simply stated the fact that Banning was still subject to punishment for this and other crimes; indeed, he went beyond this to state that "there is no question in my mind what steps should be taken to correct [Banning's] improper sentence [with respect to his conviction on a charge of which he was plainly innocent]." R. 39, footnote. Even if the prosecutor had reason to believe that Banning would be accorded leniency in return for his testimony, it was not incumbent upon him to volunteer his predictions since defense counsel had fully called the attention of the jury to Banning's possible motivations (R. 38, footnote), as did the trial judge subsequently in his charge (*supra,* p. 41).

Finally, while the Government undoubtedly treated Banning very leniently in consenting to his release on bond, notwithstanding his plea of guilty and his admission at the trial of numerous armed jewel thefts and robberies, in order that he might secure employment with the Pinkerton Detective Agency (which, for reasons undisclosed by the record, never materialized),[16]—see p. 26, *supra*—such leniency certainly does not prove the claim it is invoked primarily to substantiate.

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[16] For the circumstances attending Banning's pardon for the Weiss robbery, and the dismissal of the Cleveland indictment against him and others, see pp. 25-26, *supra.*

viz, that Banning perjured himself at the trial in *implicating petitioner as his fence.*[17]

3. Petitioner contends that Judge Picard committed reversible error in privately interviewing Sidran in the state penitentiary at Columbus, Ohio, and thereafter extrajudicially consulting with F.B.I. agents in an effort to verify the truth of what Sidran told him (Pet. 7, 11-13, 21-24).

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[17] It is true that petitioner stated in his third recanting affidavit (*supra,* p. 29) that F.B.I. agent Johnson once "bet me a $10.00 hat that if Gordon were convicted I would be freed" (R. 186-187); that, if true, such a "bet" by Johnson, to quote the Court of Appeals, "would certainly seem to be an encouragement to Banning that Gordon's conviction would result in his liberation" (R. 337); and that, so far as the record indicates, this allegation of Banning's has not been contradicted.

However, in a "Memorandum of Authorities in Support of Government's Answer to Defendant's Motion and Amended Motion for New Trial," filed in the District Court on December 14, 1948, but not included in the printed record, the Government stated: "* * * on August 23, 1948, Banning executed a new affidavit, labeled Exhibit X [his third recanting affidavit; see R. 181-190], wherein he deposed that these FBI Agents [Iseman, Willoughby, and Zeimes; see R. 93-115, and *supra,* pp. 20-25] had lied in their affidavits. In addition, he sets forth a re-hash of allegations in previous affidavits. *The Government has secured additional affidavits from persons named in Banning's latest affidavit and we are prepared to file these affidavits if the Court deems it necessary.* However, it is readily apparent that this practice of filing affidavits and counter-affidavits wherein one deponent alleges that the other deponent has lied in prior affidavits, can go on indefinitely" [italics added]. Among the "additional affidavits" referred to was one by agent Johnson, executed November 9, 1948, containing, *inter alia,* a categorical denial that he had ever made any such wager with Banning as the latter claimed. However, neither this affidavit nor any of the others referred to in the Government's memorandum was filed, evidently because the court was satisfied that the further accumulation of affidavits and counter-affidavits in the record would serve no useful purpose.

The opinion of the Court of Appeals fully reviews the facts on which this contention is based (R. 339-342) and they need not be repeated here. The Court of Appeals concluded that "In all that he did in this case, the trial judge was actuated by the highest motives of justice" [18] and that "from everything before us in this case, we can conceive of no disadvantage to Gordon resulting from the action of the trial judge" (R. 342). We submit that these conclusions are correct, and that consequently there was no prejudicial error.

The following points should be emphasized in appraising the present contention: First, Judge Picard's interview with Sidran and his subsequent consultation with the F.B.I. agents were the result of a request on the part of petitioner's daughter that he make a personal investigation into certain aspects of the case (R. 273-275, 339-340). Secondly, Judge Picard learned nothing from his extrajudicial investigations that was not already in the record in the case (R. 262-263, 264-265, 340-341).[19] And thirdly, any objection petitioner may have had to Judge Picard's investigations was waived. Pe-

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[18] Counsel for petitioner, moreover, conceded that they "don't question the good motives of the court in going to see Sidran" (R. 281).

[19] Sidran told Judge Picard exactly what he had stated in his affidavit (*supra*, pp.17-18) already on file in support of the motion for a new trial (R. 221), *viz.*, that Banning lied at the trial in placing him at the scenes of two 1940 robberies because he, Sidran, had an alibi for the crucial dates. Similarly, the data supplied the judge by the F.B.I., at his request, impeaching Sidran's veracity were also already contained in record affidavits (*supra*, p. 27; R. 262-263, 264-265).

titioner's counsel learned of the judge's extrajudicial investigations at the hearing on the motion for a new trial, held December 7, 1948 (R. 220 *et seq.*). They made no objection to the judge's activities until three weeks later (December 28, 1948, see R. 246-248), which was *after Judge Picard had denied the motion for a new trial on December 23, 1948* (R. 245). Petitioner first registered his objection in a motion to vacate the order denying the motion for a new trial (R. 246-248). Plainly, if petitioner felt that Judge Picard's extrajudicial inquiries in any way prejudiced him, he was bound, in fairness to the court, to make known his objection immediately, before the judge acted on his motion for a new trial. See colloquy at R. 297. He was not justified in waiting to see how the judge acted on his motion, and then for the first time objecting upon learning that the decision was adverse to him.

4. While his appeal was pending in the Court of Appeals, petitioner filed a motion to remand the cause to the District Court for reconsideration of its order denying the motion for a new trial (R. 310-320). The motion to remand was based on the ground that petitioner, during the pendency of the appeal, had discovered new evidence that Banning was "rewarded" for his trial testimony against petitioner, *viz.*, the dismissal, on June 28, 1947, of a Nebraska state robbery information against Banning at the "request of [the]

United States District Attorney, Detroit, Michigan" (R. 310, 317, 319-320). The Government's answer to the motion to remand (R. 320-322) was supported by an affidavit of Mr. Thornton (R. 322-327), the Assistant United States Attorney at Detroit who prosecuted petitioner in the instant case. Thornton stated in this affidavit that at the time consideration was being given to the Pinkerton Detective Agency's request to engage Banning as an undercover agent (see p. 26, *supra*), he, Thornton, realized that Banning could not be used in this capacity in view of the pendency of the state robbery charges against him in Nebraska; that he accordingly communicated with the Nebraska prosecuting attorney to inquire as to the status of the pending charges; that the Nebraska prosecutor advised him that he was planning to dismiss these charges because he doubted the possibility of a conviction in view of the acquittal of a codefendant of Banning; that he, Thornton, felt that, "in view of the active cooperation given to the Government by Banning together with the fact that he could still be useful to the law enforcement agencies and because of the weakness of the criminal case in Nebraska * * * and the further fact that [Banning] had served six years on the sentence for which he was pardoned," the ends of justice would best be served if the Nebraska charges against Banning were dismissed; and that he accordingly communicated to the Nebraska pros-

ecuting attorney "his appreciation for any favorable consideration" in regard to dismissal of the Nebraska prosecution (R. 326-327). Thornton emphasized, however, that "at no time was Banning promised the dismissal of the information against him in Nebraska as a reward for his testimony against" petitioner (R. 327). Thornton's affidavit was corroborated by an affidavit of the Nebraska prosecuting attorney (R. 328-329), who emphasized that the dismissal of the state charges against Banning was due "both [to] the weakness of the state case and the request [by Thornton] for dismissal," and that, had it not been for the former consideration, the case would not have been dismissed irrespective of any such request (R. 329).

Petitioner's contention (Pet. 8-9, 13, 37-38) that the Court of Appeals erred in denying the motion to remand (R. 345) is, we submit, without merit.[20] Mr. Thornton's intercession with the Nebraska authorities on Banning's behalf was merely cumulative evidence of the favorable treatment which Banning admittedly received following his cooperation with the Government in testifying against petitioner. For the reasons previously stated (see pp. 41-43, *supra*), that favorable consideration does not establish that Banning committed perjury when he implicated petitioner at the trial. The important fact is that Banning was not *promised*

[20] Petitioner, moreover, virtually concedes that this action by the Court of Appeals is not a valid ground for certiorari (Pet. 38).

anything as a reward for his cooperation, as attested by Thornton in his affidavit (*supra*). The Court of Appeals, therefore, correctly determined that the new evidence relied on in the motion to remand was insufficient to warrant a different disposition by the District Court of the motion for a new trial, and therefore appropriately exercised its discretion in denying the motion to remand.

CONCLUSION

The petition for a writ of certiorari, in our judgment, presents no question requiring further review by this Court, and should therefore be denied.

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MARCH, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 879294 872